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Counsellors at Law  
1201 Pennsylvania Avenue, N.W.  
P.O. Box 407  
Washington, D.C. 20044-0407

Telephone (202) 626-6600  
Cable Squire DC  
Telex (202) 626-6780

*International Offices:*  
Brussels, Belgium  
Budapest, Hungary  
London, England  
Prague, Czech Republic

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(202) 626-6634

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

At first blush, a rule requiring the use of "paper" contracts would appear to create a break (or "cooling off period") between the execution of a contract and the start of service. The delay, however, could be minimal if an unscrupulous ISP were to place order forms (i.e.,

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"paper" contracts) in periodicals or on bulletin boards and encourage the filing of these orders by fax. (Some manufacturers of fax machines already use this technique to register warranties, check the performance of newly purchased devices, and establish service contracts.) Alternatively, and far easier, an unscrupulous ISP could begin providing service based on a caller's representation that a signed order form or contract is in the mail.

Similarly, a rule requiring "paper" contracts would appear to provide consumers with protection against unscrupulous ISPs by creating a physical (i.e., paper) record of their agreement. Such a physical record would exist, however, only if a consumer were to make, and then keep, a copy of its completed order form or contract. A rule requiring "paper" contracts would also appear to ensure that only legally competent individuals order information services. "Paper" contracts, however, will rarely -- if ever -- be delivered in person. Rather, they will be sent through the mails, by fax, or through some other means. As a consequence, a minor could easily represent himself/herself as an adult or use his/her parent's name and forge their signature. An unscrupulous ISP would not be concerned about the legal competence of the individual signing a contract and ordering service

Notwithstanding the relatively modest differences between "paper" and on-line contracts, GEIS has concluded that there are ways in which the Commission can provide consumers with additional protection against unscrupulous ISPs without unduly restricting the use of on-line agreements.

First, the Commission can prohibit carriers from performing billing and collection for information services provided pursuant to on-line contracts. Although such a requirement would not present a problem for most legitimate ISPs, it would make billing and -- more important -- collection difficult for unscrupulous ISPs.

Second, the Commission can require ISPs that make use of on-line contracts to offer their subscribers the ability to print or download a copy of their on-line contract at no charge to the consumer. Such a requirement would provide consumers with a tangible record of their executed service agreement.

Third, the Commission can prohibit ISPs that make use of on-line agreements from providing any information service to a customer during the call in which the customer first executes the on-line agreement. Although such a prohibition exalts form over substance, it will reduce the potential for confusion about whether the consumer will incur any charges during the first "toll

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free" call. Moreover, by requiring the consumer to hang up and place a second call (and, in the case of legitimate ISPs, more likely than not to a different number), such a requirement will provide the consumer with an opportunity to reflect -- however briefly -- on whether to make a second call and incur charges.

In addition to the three safeguards outlined above, GEIS considered a number of other alternatives that were based on the type of information service being provided and the identity of the customer being served. None of these alternatives, however, would likely be effective in halting the abusive practices of unscrupulous ISPs. GEIS, for example, considered proposing a rule that would limit the use of on-line contracts to business information services. An unscrupulous ISP could easily avoid such a limitation by packaging a legitimate, but never intended to be used, business service with the service actually desired by the consumer. Similarly, a non-business service (e.g., pornography) could be euphemistically labelled as a business service (e.g., a "graphic information management service"). Such a rule would also fail to take into account the fact that there are many services that could arguably find uses by both business and residential consumers.

GEIS also considered a rule that would limit the use of on-line contracts to business customers. This, too, would likely be unenforceable. An unscrupulous ISP could easily persuade callers to name their employer or their parents' employer as part of the application process. An unscrupulous ISP could also characterize a caller (or encourage a caller to characterize himself/herself) as a sole proprietor of a small business.

In addition to concerns about unscrupulous ISPs, your staff raised a question about the Commission's ability to adopt a rule in this proceeding that approves the use of on-line contracts, consistent with the requirements of the Administrative Procedure Act ("APA"). The question appears to be predicated on concerns about both notice and the record. Insofar as notice is concerned, the courts have consistently concluded that the Commission will be deemed to have complied with the requirements of the APA "so long as the content of the agency's final rule is a 'logical outgrowth' of its rulemaking proposal. . . . The focus of the 'logical outgrowth' test, we have added, 'is whether . . . [the party], ex ante, should have anticipated that such a requirement might be imposed.'" Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445-46 (D.C. Cir. 1991).

In this proceeding, the Commission's Notice of Proposed Rulemaking ("Notice") expressly raised the question whether the Commission should revise Section 64.1501 of its rules so as to mandate "a contractual agreement, executed in writing." As you know, "writing" is a term of art in contract law. If "writing" includes, as GEIS believes it does, on-line contracts, the Commission plainly has given adequate notice of a rule allowing the use of such agreements. (The law review article which we provided you and which we have filed in the record of this

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proceeding suggests that the courts would concur in such a conclusion.) If "writing" is limited to "paper" contracts and the Commission decides to accept something less than "paper" contracts, i.e., on-line contracts, the Commission also has given adequate notice, since its new rules would reflect a lesser included alternative than that originally proposed by the Notice.

As concerns the adequacy of the record, GEIS submits that the adoption of a rule that includes on-line contracts within the term "writing" reflects a legal, rather than factual or policy, judgment. Moreover, the materials which GEIS has filed in the record of this proceeding documenting its ex parte presentations to you and your staff provide more than adequate support for the adoption of a rule allowing the use of on-line agreements. Clearly, the Commission is entitled to -- and, in the past, has concluded that it may -- act on the basis of such ex parte presentations in a rulemaking proceeding where, as here, those presentations are formally part of the record. See, e.g., Authorizing Private Carrier Systems in the Private Operational-Fixed Microwave Radio Service, PR Docket No. 83-426, FCC 85-53, 50 Fed. Reg. 13338 (¶ 67) (Apr. 4, 1985) (decision to preempt states predicated solely on two ex parte statements).

We hope the foregoing is responsive to your inquiries. GEIS would be pleased to meet with you or your staff to discuss its proposals at greater length. In the interim, please let us know if you have any questions or if we can provide you with any additional information.

Sincerely,



Joseph P. Markoski

/jef

cc: William F. Caton  
John B. Muleta  
Mary Beth Richards  
Mary Romano  
Warner Sinback